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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

NO. 332 OCTOBER TERM, 1949.

LEON JOHNSON, alias ROBERT McMILLAN,
Petitioner,

v.

CHARLES L. DYE, Warden of the Allegheny County Jail, Respondent.

PETITION FOR RE-HEARING AND STAY OF MANDATE AND BRIEF IN SUPPORT THEREOF.

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HYMEN SCHLESINGER,
310 Jones Law Building,
Pittsburgh, Pa.

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15th and H Street N. W.,
Washington, D. C.,
Attorneys for Petitioner.

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CHARLES L. DYE, Warden of the Allegheny County Jail, Respondent.

PETITION FOR RE-HEARING AND STAY OF MANDATE.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

AND NOW, comes the plaintiff petitioner, LEON JOHNSON, alias ROBERT MCMILLAN, by counsel, and prays this Honorable Court to grant a re-hearing in the above captioned case and to stay the mandate, pending disposition thereof.

FIRST: At the above number and term, respondent above named filed a petition for writ of certiorari, addressed to this Honorable Court and directed to the Court of Appeals for the Third Circuit, and the State of Georgia filed a brief in support thereof as *amicus curiae.*

SECOND: After due deliberation and discussion with the national office of the American Civil Liberties Union, it was decided not to oppose the petition for certiorari because of the importance of the case raising constitutional questions and for the further reason that it was felt and decided that an opinion from the United States Supreme Court was necessary and desirable to clarify these questions, and in support thereof, hereto attached, made a part hereof and marked Exhibit "A", is an Affidavit executed by Herbert M. Levy, Staff Counsel for the American Civil Liberties Union.

THIRD: Under date of October 22, 1949, counsel was in receipt of a communication from the Clerk of the United States Supreme Court, a copy of which is hereto attached, made a part hereof and marked Exhibit "B".

FOURTH: In reply thereto, counsel notified the Clerk of the United States Supreme Court by letter dated October 25, 1949, a copy of which is hereto attached, made a part hereof and marked Exhibit "C", that no answer would be filed in opposition to the petition for certiorari.

FIFTH: In reply thereto, counsel was in receipt of a communication dated October 28, 1949, a copy of which is hereto attached, made a part hereof and marked Exhibit "D", indicating that: "In the event certiorari is granted, the case will be heard in January."

SIXTH: Counsel was of the opinion that the certiorari would most likely be granted and after filing a brief in support of petitioner's position, that the case would be heard on oral argument by the United States Supreme Court.

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SEVENTH: On November 7, 1949, the United States Supreme Court entered the following Order in the above captioned proceedings:

> "PER CURIAM: The petition for writ of ceritorari is granted and the judgment is reversed. Ex parte Hawk, 321 U. S. 114. Mr. Justice Douglas took no part in the consideration or decision of this case."

EIGHTH: Counsel for your petitioner feels that the case deserves the attention and consideration of the United States Supreme Court on the merits and prays that a re-hearing may be granted in order that the case may be argued orally in accordance with the rules and that the mandate of this Honorable Court shall be stayed, pending action hereon.

NINTH: Counsel is herewith submitting a brief in support of the questions raised by this appeal.

Respectfully submitted,

SAMUEL J. GOLDSTEIN,
HYMEN SCHLESINGER,
Attorneys for Petitioner.

AFFIDAVIT.

State of Pennsylvania }
County of Allegheny } ss.:

Before me, a Notary Public, in and for the county and state aforesaid, personally appeared SAMUEL J. GOLDSTEIN, Esquire, who, being duly sworn according to law, deposes and says that the foregoing Petition is presented in good faith, not for the purpose of delay and the facts contained therein are true and correct to the best knowledge and information of your affiant.

/s/ SAMUEL J. GOLDSTEIN.

Sworn to and subscribed before me this 15th day of November, 1949.

/s/ LOIS E. THOMAS,
(SEAL) Notary Public.

My Commission Expires at the End of the Next Session of Senate.

Exhibit "A."

State of New York }
County of New York } ss.:

HERBERT M. LEVY, being duly sworn, deposes and says that:

1. He is Staff Counsel of the American Civil Liberties Union, hereinafter called "ACLU".

2. The case of Dye, petitioner, v. Johnson, is a test case brought by the said ACLU.

3. When deponent was advised that a petition for certiorari had been filed in the above-mentioned case, he immediately consulted by mail with Samuel J. Goldstein,

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Esq., Attorney of record for Johnson, and advised him of his opinion that a Supreme Court review of the case was desirable, although the decision below was favorable to ACLU, so as to settle the law on whether a state was barred from the use of the remedy of extradition if it had treated a prisoner with cruel and unusual punishment or would do so in the future. Deponent then advised the said Mr. Goldstein that it was his opinion that ACLU should take no action until and unless the Supreme Court granted certiorari, at which time ACLU would file a brief on behalf of Johnson in accord with the position of the Circuit Court of Appeals.

4. Deponent reported his views to a regular meeting of the Board of Directors of the American Civil Liberties Union held October 10, 1949 in New York, New York. The Board unanimously agreed to follow the said advice. The minutes read that "The Board approved an amount, not to exceed $250.00 to cover expenses if the Supreme Court grants review."

5. This information was conveyed by letter to the said Mr. Goldstein, dated October 13, 1949. On the 17th of October, 1949, the said Mr. Goldstein wrote deponent that "I am happy to inform you that the suggestions you made therein are all satisfactory. I have decided not to oppose certiorari and in the event the Supreme Court grants the writ, I shall represent Johnson * * *"

6. The above sets forth the only reasons for Johnson's failure to oppose the petition for certiorari. Deponent feels that this Court's action in reversing the decision below without hearing may have been due to the failure to oppose the petition. It was expected by

deponent as well as by other counsel for the ACLU that, in accordance with usual procedures, argument would be held and briefs submitted when certiorari was granted. Deponent respectfully submits that Johnson, a review of his case having been granted, is at the very least entitled to a hearing on the merits thereof, and deponent regrets exceedingly any misimpressions the Court may have been given which caused it to rule otherwise.

WHEREFORE, deponent respectfully requests that this petition for rehearing be in all respects granted.

(signed) HERBERT M. LEVY

Sworn to before me this 10th day of November, 1949.

(signed) FRED N. GRAFER
Notary Public,
State of New York, Qualified in Queens County, No. 41-1528150 Cert. Filed in New York County Commission Expires March 30, 1951.

(SEAL)

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Exhibit "B."

COPY

OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON 13, D. C.

October 22, 1949.

Samuel J. Goldstein, Esquire,
Pittsburgh, Pennsylvania.

Dear Sir:

The records of this office indicate that you accepted service of a copy of the petition and record in the case of Dye, etc. v. Johnson, etc., No. 332, October Term 1949, on September 20th. Accordingly, a brief in opposition should have been filed on or before October 20th. I assume that it is not your intention to file such a brief but because of the suggestion you made concerning the record, I wish to be certain that no opposition will be filed and that the petition may now be submitted to the Court for its consideration.

Yours truly,

CHARLES ELMORE CROPLEY, Clerk,

By /s/ H. B. Winny
Deputy

HBW:ds

Exhibit "C."

COPY

October 25, 1949.

Charles Elmore Cropley, Clerk,
Supreme Court of the United States,
Washington 13, D. C.

In Re: Dye v. Johnson,
332 October Term, 1949.

Dear Sir:

I am in receipt of yours of the 22nd anent the above case and would appreciate your informing me when this case might be called for argument in the event certiorari is granted. In the meantime, however, counsel intends to file a petition in re diminution of the record.

In reply to your query, please be informed that no answer will be filed in opposition to the petition for certiorari.

Yours very truly,

.....

SJG:PR

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Exhibit "D."

COPY

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON 13, D. C.

October 28, 1949.

Samuel J. Goldstein, Esquire,
Pittsburgh, Pennsylvania.

Dear Sir:

I have your letter of the 25th instant advising me that you will not file a response to the petition for writ of certiorari in the case of Dye, etc. v. Johnson, etc., No. 332, October Term, 1949. Accordingly, the petition will be submitted to the Court for its consideration and action may be expected on November 7th. In the event certiorari is granted, the case will be heard in January.

Yours truly,

CHARLES ELMORE CROPLEY, Clerk,

By /s/ H. B. Winny
Deputy

HBW:ds

IN THE

Supreme Court of the United States

NO. 332 OCTOBER TERM, 1949.

LEON JOHNSON, alias ROBERT McMILLAN,
Petitioner,

v.

CHARLES L. DYE, Warden of the Allegheny County Jail, Respondent.

BRIEF IN SUPPORT OF PETITION FOR RE-HEARING.

History of the Case.

The petitioner, Leon Johnson, is in the custody of the Commonwealth of Pennsylvania and is presently confined in the Allegheny County Jail, of which the respondent, Charles L. Dye, is the Warden. Johnson was indicted in the Cobb County Superior Court of the State of Georgia for the murder of one Sarah Frances Thompson on December 6, 1942. He was tried by a jury which found him guilty of murder with a recommendation of mercy on January 25, 1943. Under the law of Georgia, Georgia Code (fol. 59) Annotated, 1935, Title 26, § 1005, the recommendation of the jury fixed the penalty at life imprisonment. The court thereupon sentenced Johnson

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to hard labor for life.[1] In June 1943, the petitioner escaped from a Georgia chain gang and eventually came to Allegheny County, Pennsylvania. Governor Arnall of Georgia dispatched a requisition for extradition to Governor James of Pennsylvania who issued an executive warrant under which Johnson was apprehended. An application for extradition was made pursuant to the Uniform Criminal Extradition Act, Laws of Pennsylvania 1941, July 8, P. L. 288, 19 P. S. Pa. § 191. See also the so-called "Interstate Extradition Act," R. S. § § 5278-0, 18 U. S. C. § § 662-3, 1940 ed. So far as appears Governor James did not call on the Attorney General or any prosecuting officer of Pennsylvania as he was authorized to do under the Act to investigate the demand made by the State of Georgia. Johnson petitioned the Court of Common Pleas of Allegheny County for a writ of *habeas corpus* at its No. 3679, April Term, 1946. The Court of Common Pleas refused to free Johnson and discharged the writ. The decision was reviewed by the Superior Court of Pennsylvania which affirmed the judgment of the court below. 159 Pa. Super. 542, 49 A. 2d 195. No review was sought by Johnson in the Supreme Court of Pennsylvania or in the Supreme Court of the United States. On November 14, 1946 Johnson petitioned the United States District Court for the West-

---

[1] The Court apparently exceeded its authority in sentencing Johnson to *hard labor*. The law of Georgia authorizes "confinement and labor," where the sentence includes imprisonment. See Georgia Code Annotated, Title 27, Sec. 2504. However, this unlawful imposition of hard labor to the sentence of imprisonment does not of itself render the sentence void so as to entitle the prisoner to discharge on *habeas corpus*. See Harlan v. McGourin, 218 U. S. 442; U. S. v. Pridgeon, 153 U. S. 48.

ern District of Pennsylvania for a writ of *habeas corpus*. After the issuance of a rule to show cause on the petition and upon answers filed and after a full hearing the court below filed an opinion, 71 F. Supp. 262, and discharged the writ. Johnson appealed to the Court of Appeals who, on May 17, 1949, reversed the court below on the theory that Johnson's constitutional right had been violated by the cruel and inhuman punishment to which he was subjected at the hands of his jailors to the extent that his life and health was in grave jeopardy if returned to the State of Georgia.

The Court of Appeals held that the State of Georgia had failed signally in its duty as one of the sovereign states to treat a convict with decency and humanity in violation of the Fourteenth Amendment and in violation of the explicit mandate of the constitution of the State of Georgia. The testimony established that Johnson had been a member of a chain gang and treated with persistent and deliberate brutality.

Following the decision of the Court of Appeals, the defendant filed a petition for certiorari in this Honorable Court, which was granted on November 7, 1949, and the judgment of the court below was reversed without argument, no answer to the petition for certiorari having been filed by your petitioner in opposition thereto since it was felt that a decision by this Honorable Court was warranted and desirable.

Statement of Questions Involved.

1. Does the Due Process Clause of the Fourteenth Amendment include by implication the cruel punishment prohibition contained in the Eighth Amendment?

2. In extradition cases, is the theory of exhaustion of remedies applicable?

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Argument.

I.

The Lower Court in holding that the Eighth Amendment was not a limitation upon the states cited *Collins v. Johnston,* 237 U. S. 503 but the Court of Appeals held that the Lower Court misinterpreted the ruling of Collins v. Johnston. In that case there was an appeal to the Supreme Court from a denial of the Lower Federal Court for a writ of *habeas corpus.* Among other things, the petitioner alleged that the sentence of fourteen years (for perjury) was excessive but it appeared that the laws of California permitted the imposition of such a sentence even though the term may have been unusually long. The petitioner claimed that the imposition of such a sentence was the infliction of cruel and unusual punishment, hence in violation of his rights under the Fourteenth Amendment, since by implication the Fourteenth Amendment included the prohibitions contained in the first eight amendments. It was not found that there was any cruel and unusual punishment so that any rulings on this point can be turned *obiter.* But in any event, the Court relied on a whole line of cases holding that the Eighth Amendment was a limitation on the states and not on the Federal Government. There was no effort in the Collins case by the petitioner to argue that deprivation of due process in the Fourteenth Amendment included all of the prohibitions contained in the Bill of Rights. Even today however, under the new and accepted theory all of the prohibitions contained in the Bill of Rights are not necessarily includable in the prohibitions contained in the Fourteenth Amend-

ment with respect to violation or deprivation of constitutional rights.

The Appeals Court stated that:

"While it is true that the Eighth Amendment to the constitution of the United States limits and was intended to limit Federal action, there is the modern view, and, we feel, the correct one, that where the right protected and guaranteed under the Bill of Rights (Amendments I to VIII) of the United States Constitution is 'basic' and 'fundamental' to the rights of life and liberty, recognized and guaranteed by the Constitution of the United States, then the due process clause of the Fourteenth Amendment prohibits a state from abridging or denying the right in question * * *"

In taking this view, the Appeals Court refused to make secure against state invasion all the rights protected from Federal violation by the Bill of Rights, *Chambers v. Florida,* 309 U. S. 227; *Twining v. New Jersey,* 211 U. S. 78; *Maxwell v. Dow,* 176 U. S. 581; *Palko v. Connecticut,* 302 U. S. 319 and *Hague v. C. I. O.,* 307 U. S. 496 (there were dissenting opinions in the Twining and Maxwell cases). But by gradual process of infiltration such rights as freedom of speech, freedom of religion, freedom of the press and the right to counsel have been included on the theory that where the right invaded is basic and fundamental, the due process clause of the Fourteenth Amendment includes by implementation those guarantees of the Bill of Rights. The Court of Appeals merely went one step further in adding that cruel and unusual punishment is so basic and funda-

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mental as to be included by implication in the rights guaranteed to every person by the Fourteenth Amendment: *Saia v. New York,* 334 U. S. 558; *Cantwell v. Connecticut,* 310 U. S. 296; *Marsh v. Alabama,* 396 U. S. 501; *Lovell v. Griffin,* 303 U. S. 444; *Hague v. C. I. O.,* 307 U. S. 496; *Wade v. Mayo,* 334 U. S. 672; *Powell v. Alabama,* 287 U. S. 45; *Betts v. Brady,* 316 U. S. 455; *Palko v. Connecticut,* 302 U. S. 319; *Francis v. Resweber,* 329 U. S. 459. (In this latter case, Mr. Justice Reed indicated that violation of the Fifth and Eighth Amendments as to double jeopardy and cruel and unusual punishment would be violative of the due process clause of the Fourteenth Amendment.

In *Best v. Brady,* 316 U. S. 455, the Court said:

"The Sixth Amendment of the national Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate in a given case to deprive a litigant of due process of law in violation of the Fourteenth."

In *Palko v. Connecticut,* 302 U. S. 324, the Court said:

"In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."

In *Francis v. Resweber,* 329 U. S. 459, in an opinion by Justice Reed, concurred in by the Chief Justice, Mr. Justice Black and Mr. Justice Jackson, and in which Mr. Justice Frankfurter concurred but Justice Burton dissented, the petitioner was convicted of murder and sentenced to be electrocuted. Upon a proper death warrant, Francis was prepared for execution and placed in the electric chair but when the executioner threw the switch, death did not result. He was thereupon removed from the chair and returned to prison following which a new execution date was set and a new death warrant issued. The Supreme Court of Louisiana denied the petitioner's applications for certiorari, mandamus, prohibition and *habeas corpus* on the theory that the petitioner claimed the protection of the Due Process Clause of the Fourteenth Amendment for the reason that execution did deny him due process because of the double jeopardy provision of the Fifth Amendment and the cruel and unusual punishment provision of the Eighth Amendment.

The Supreme Court granted certiorari in order to consider the alleged violation of rights under the Federal Constitution. The case turned on the question as to whether or not the proposed enforcement of the criminal law of the state, viz., the second execution, was offensive to any constitutional requirements.

Justice Reed stated that there is:

"no difference from a constitutional point of view between a new trial on an error of law at the instance of the state that results in a death sentence instead of imprisonment for life, and an execution that follows a failure of equipment.

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When an accident, with no suggestion of malevolence, prevents the consummation of a sentence, the State's subsequent course in the administration of its criminal law is not affected on that account by any requirements of due process under the Fourteenth Amendment. We find no double jeopardy here which can be said to amount to a denial of Federal due process in the proposed execution.

Second. We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. The case before us does not call for an examination into any punishments except that of death."

The Court cited *In re Kemmler,* 136 U. S. 436, which held that if the punishment prescribed for an offense was manifestly cruel and unusual as burning at the stake, crucification, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties within the constitutional prohibition. The Supreme Court added that:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the constitution. It implies something inhuman and barbarous, something more than a mere extinguishment of life."

The Court further held that there was no denial to Francis of equal protection of the laws since he was not subjected to more cruel punishment than others in his position.

In his concurring opinion, Mr. Justice Frankfurter opined that the Fourteenth Amendment did not absorb the provisions of the Bill of Rights and added that:

> "Not until recently was it suggested that the Due Process Clause of the Fourteenth Amendment was merely a compendious reference to the Bill of Rights whereby the States were now restricted in devising and enforcing their penal code precisely as is the Federal Government by the first eight amendments. * * * The Fourteenth Amendment did not mean to imprison the states into the limited experience of the Eighteenth Century. It did mean to withdraw from the states the right to act in ways that are offensive to a decent respect for the dignity of man, and heedless of his freedom.
>
> * * * * * * *
>
> In an impressive body of decisions this Court has decided that the Due Process Clause of the Fourteenth Amendment expressed a demand for civilized standards which are undefined by the specifically enumerated guarantees of the Bill of Rights. They neither contain the particularities of the first eight amendments nor are they confined to them. * * * Insofar as due process under the Fourteenth Amendment requires the states to observe any of the immunities 'that are valid as against the Federal Government by force of the specific pledges of particular amendments,' it does *show cause* that 'have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the States.' *Palko v. Connecticut, supra,,* at 324-5."

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On this point, the Court relied on *Twining v. New Jersey*, 211-78; *Snyder v. Moss*, 291 U. S. 97; *Palko v. Connecticut, supra*, and *Feldman v. U. S.*, 322 U. S.

The Due Process Clause of the Fourteenth Amendment did not withdraw the freedom of the State to enforce its own notions of fairness unless according to Mr. Justice Cardozo

> "In so doing shall offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

> "Again, the State may be found to deny a person due process by treating even one guilty of crime in a manner that violates standards of decency, more or less universally accepted though not when it treats him by a mode about which opinion is fairly divided. But the penological policy of a State is not to be tested by the scope of the English Amendment and therein involved in the controversy which is necessarily evoked by that Amendment as to the historic meaning of 'cruel and unusual punishment.' See *Weems v. U. S.*, 217, U. S. 349, and particularly the dissenting opinion of White and Holmes, J. J."

In a dissenting opinion by Mr. Justice Burton, concurred in by Douglas, Murphy and Rutledge, the opinion stated that:

> "A capital case before us presents an instance of a violation of constitutional due process that is more clear than would be presented by many lessor punishments prohibited by the Eighth Amendment. • • • Taking human life by unnecessary cruel means shocks the most fundamental instincts of

> civilized man. * * * It is unthinkable that any state legislature in modern times would enact a statute expressly authorizing capital punishment by repeat applications of an electric current separated by intervals of days or hours until finally death shall result."

The dissenting opinion held that there could be no implied provision in the penal code of Louisiana for the application of a second, third or more subsequent currents of electricity on subsequent occasions. When the test of whether or not electrocution was violative of the Fourteenth Amendment the decision upholding the punishment was based primarily on the conclusion that such punishment resulting in death was instantaneous, painless and humane.

Judge Biggs pointed out that actions of the employees of the prison system of Georgia must be deemed to be those of the State of Georgia, and the fact that a state officer acts illegally cannot relieve a State of responsibility for his acts. *Screws v. U. S.*, 325 U. S. 91.

In deciding the question of whether or not Johnson was subjected to cruel and unusual punishment, although it was clear that the Court Below did not expressly state that he found Johnson's evidence credible, the District Court nevertheless found that he had been subjected to cruel and unusual punishment. The Court of Appeals ruled that:

> "In any event upon appeal in a *habeas corpus* case all questions of law or fact arising upon the record, including the evidence, are open to consideration by the appellate court and the trial court has no au-

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thority to make conclusive findings of fact as in the ordinary action, Johnson v. Sayre, 158 U. S. 109, and we are not bound by the conclusions of the trial court, Carruthers v. Reed, 8 Cir., 102 F. 2d 933, 937. The hearing before this court is technically *de novo*. It is our conclusion upon careful consideration of the record in the court below that Johnson was subjected to cruel and unusual punishment following his sentence and that this holding is in accordance, and not at variance, with that of the court below. Indeed no other conclusion would be possible in view of the known facts concerning the working of the Georgia penal system at the time of the petitioner's sentence and in consideration of the circumstance that the State of Georgia offered no testimony whatsoever in contradiction to that given by Johnson and his witnesses. (fol. 67) Our conclusion that Johnson was subjected to cruel and unusual punishment is buttressed by the decision of the Supreme Court in *In re* Kemmler and Weems v. United States, *supra*. Weems, under Section 56 of the Penal Code of the Philippine Islands, Act of July 1, 1902, had been guilty and had been sentenced *inter alia* 'to the penalty of fifteen years of cadena together with the accessories of Section 56 of the (Philippine) Penal Code * * *'. The *cadena* consisted of a chain at the ankle hanging from the wrists to be worn at all times. The 'accessories' of Section 56 would have deprived Weems almost completely of personal and familial rights and subjected him to constant surveillance by the authorities. The Supreme Court of the United States, by Mr. Justice McKenna, decided that the punishment was a cruel

and unusual one. Accordingly, the judgment was reversed and the trial court was directed to dismiss the proceedings. Though the Supreme Court has not set down any precise standard as to what constitutes cruel and unusual punishment, Wilkerson v. Utah, 99 U. S. 130, 135-6, we conclude without hesitation that if Johnson was treated by the prison authorities of Georgia in the manner which he alleges, he was subjected to cruel and unusual punishment by the State of Georgia. We know of no way in which degrees of cruelty may be measured coldly as if upon an altimeter, so much for the heights of cruelty, so much for the depths thereof.

The obligation of a State to treat its convicts with decency and humanity is an absolute one and a federal court will not overlook a breach of that duty. The Supreme Court so held in effect in the Weems case though the punishment of the *cadena* had been imposed by a Territorial Court of the Philippines. The obligation not to inflict cruel and (fol. 68) unusual punishment laid upon a State by the Constitution of the United States must be deemed to be positive and binding. In the Weems case cruel and unusual punishment reasonably was to be anticipated under the sentence. In the instant case, cruel and unusual punishment already has been inflicted on Johnson as the court below and we ourselves have found. History is as potent a force as anticipation. It follows, therefore, that Johnson must be set at liberty for the State of Georgia has failed signally in its duty as one of the sovereign States of the United States to treat a convict with decency and humanity. It must be pointed out also that

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she has failed also to observe the explicit mandates of her own Constitution which pointedly, as if the very evil here under consideration was in mind, go as far, if not farther, than those of the Eighth Amendment to the Constitution of the United States."

II.

At the outset it is pertinent to state the general rule which has come to be known as the doctrine of exhaustion of state remedies as it applies to a petition for writ of *habeas corpus* to discharge a person held in violation of his federal constitutional rights. The rule (which is really a custom or practice followed by the Federal Courts) was stated by the Supreme Court *Ex Parte Hawk,* 321 U. S. 114:

> "*Ordinarily* an application for habeas corpus by one *detained under a state court judgment of conviction* for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari have been exhausted." (emphasis ours)

We emphasize the portion of the above rule which we consider of vital importance in this case and which is to be carefully distinguished from the rule in extradition cases. We note below an important modification of the rule in the Hawk case made by the Supreme Court in *Wade v. Mayo,* 334 U. S. 672.

The reasons for the rule, says the Court, are "grounded primarily upon the respect which federal

courts have for the state judicial processes and upon the administrative necessities of the federal judiciary."

In order to avoid collision with the state courts, the federal courts have always felt that state courts of the state of the "judgment of conviction for crime" should have the first opportunity to pass upon the federal constitutional questions raised by the prisoner. With this rule we do not take issue. It is not, however, applicable to *habeas corpus* proceedings in extradition cases. Where the prisoner is confined in a jurisdiction other than that of the state where the judgment of conviction was entered, we submit that applicable statutes and decisions permit the constitutional question to be raised in the asylum state either in the state or federal courts. This Court squarely ruled on this issue in the case of *U. S. ex rel Darcy v. Supt. of County Prisons,* 111 F (2) 409, 411:

> "The right of the State of California, to demand the rendition of the relator from the State of Pennsylvania is found in Article IV, Sec. 2, Clause 2 of the Constitution of the United States. This clause is not self-executing but is made effective by Act of Congress. The Supreme Court has construed this act as placing the burden upon the governor of the asylum state to determine, before complying with the demand, whether the person demanded is substantially charged with a crime, and whether he is a fugitive from justice. This determination may be made by the governor without a hearing, *but if the alleged fugitive considers himself aggrieved by the order he may obtain a hearing upon writ of habeas corpus. The writ may be allowed either by a state or a federal court."* (emphasis ours)

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Judge Maris, in writing the Opinion, based his reasoning on the case of *Robert v. Reilly,* 116 U. S. 80, which has been cited frequently with approval. The Supreme Court denied certiorari in the Darcy case at 311 U. S. 662.

In another recent case which considered the issue of jurisdiction of the federal courts in extradition cases it was decided that not only does the petitioner have the right to make an election between federal and state courts but after having made such an election and having proceeded in the state courts, he could discontinue the state court proceedings and institute *habeas corpus* application in the federal courts, *United States v. Meyering,* 75 F (2) 716, 718.

The rule relating to extradition cases differing as it does from all other *habeas corpus* actions, is similarly stated in *22 Am. Jur.,* p. 293, Extradition sec. 54:

> "After the governor causes, by his warrant, the arrest and delivery of a person charged as a fugitive from justice from another state, the prisoner, since he is held under color of authority derived from the Constitution and laws of the United States, may invoke the judgment of the Federal, as well as the state tribunals on the lawfulness of his arrest and imprisonment."

It makes no difference whether a given state has enacted a state extradition law or not because the effect of such extradition statutes are simply in aid of and ancillary to the Act of Congress, as is stated in 135 A. L. R., p. 985, annotation:

> "Extradition statutes have been enacted by some of the states, and the validity of such legislation an-

cillary to, and in the aid of, the act of Congress in regard to interstate extradition is now well established."

See also *22 Am. Jur.*, 249, Extradition, sec. 9.

While the 3rd Circuit Court in a Per Curiam Opinion in the case of *Powell v. Meyer,* 147 F (2) 606, sustained the District Court in refusing to entertain a petition for *habeas corpus* in an extradition case, we think that, in doing so, this Court did not take into consideration its Opinion in the Darcy case. This Court based its action on the case of *Sanderlin v. Smyth,* 138 F (2) 729, stating that, under the authority of the Sanderlin case, the petitioner must first exhaust his remedies in the State Courts. An examination of the Sanderlin case clearly shows that it is not an extradition case and, therefore, cannot rule the question of federal court jurisdiction in extradition cases. We think that the great weight of authority, as shown in the careful reasoning of Judge Maris, is in favor of the rule as stated by him in the Darcy case, (*supra*).

Notwithstanding our firm conviction that the rule in extradition cases is now well established and requires careful distinction from the rule in other *habeas corpus* actions requiring state remedies to be exhausted, we, nevertheless, contend that the petitioner in the case at bar has actually "exhausted" the state remedies and complied with the rule *as modified* in *Wade v. Mayo.* In the Wade case the Court re-stated the rule relating to exhaustion of remedies by declaring that it was no longer necessary to proceed by appeal or certiorari to that Court from the decision of the highest state court:

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"Writs of certiorari are matters of grace. Matters relevant to the exercise of our certiorari discretion frequently result in denials of the writ without any consideration of the merits. The constitutional issue may thus have no bearing upon the denial of the writ. Where it is apparent or *even possible* that such would be the disposition of a petition for certiorari from the state court's judgment, failure to file a petition should not prejudice the right to file a habeas corpus application in a district court. *Good judicial administration is not furthered by insistence on futile procedure.*" (emphasis ours)

We emphasize the statement of the Court that where resort to a higher court is not a matter of right but a matter of grace and there is a possibility that such court will not hear the case, then such procedure would be futile. By anology the same reasoning could be applied to the Pennsylvania courts. The Superior Court has passed on Johnson's application by appeal from the Common Pleas Court (159 Pa. Sup. 542). There is no right to appeal from the Superior Court to the State Supreme Court in cases of this kind as the matter is one of *discretion* whether the Supreme Court will allow such appeal. The applicable State statute, although it contains positive language, has been construed otherwise.

The Act of June 24, 1895, P. L. 212, sec. 7 (e) 17 P.S. 190 reads:

"Nevertheless in any action or proceeding whatever above committed to the final and exclusive decision of the said court (i.e. the Superior Court) there

may still be an appeal from its judgment to the Supreme Court:

* * * * * * *

Second. If the case involves the construction or application of the constitution of the United States or any statute or treaty of the U. S."

The language of the Act was stated to mean that appeals to the State Supreme Court were matters of grace only, even where a federal constitutional question was involved. The State Court based its reasoning on the analogy of the position of the U. S. Supreme Court as will be noted in the case of *Com. v. Gardner,* 297 Pa. 498:

"The Supreme Court of the United States has many times declined jurisdiction 'where it appears that the constitutional question (upon which jurisdiction must depend) is not * * * substantial' (citing cases); *the same rule obtains with us to the extent above indicated.*

"* * * a constitutional point once definitely decided by us no longer exists as such; therefore it may not be insisted upon in a subsequent case as entitling one to an appeal, and we see no reason here to allow an *appeal as a matter of grace.* (emphasis supplied.)

The primary reason for the adoption of the rule relating to exhaustion of remedies in the state courts in *habeas corpus* cases before application to the federal courts is to avoid collision between the two, *Wade v. Mayo.* A reasonable application of the rule relating to exhaustion of remedies (if this Court feels constrained

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to apply such rule in this case, which it is not required to do) would be that jurisdiction of the federal courts may be invoked when it is shown that the appropriate appellate court of the state where the prisoner is detained has passed on the constitutional questions raised. We have seen that application for certiorari to the U. S. Supreme Court is no longer necessary. By the same logic, it is our contention that application from the State Superior Court to the State Supreme Court by Petition For Allocatur is unnecessary, as this is a matter of grace and not a matter of right, even where federal constitutional questions are involved, *Com. v. Gardner.*

While it is true that the Pennsylvania Supreme Court has original jurisdiction in *habeas corpus,* as we shall see below, nevertheless, that court has been reluctant to review by such procedure the action of the Superior Court, especially where the issues raised in the Superior Court were the same as those being raised in the State Supreme Court. To illustrate, we cite the case of *Com. ex rel. Penland v. Ashe,* 341 Pa. 337, where the State Supreme Court held at p. 340:

> " In view of the fact that the relator petitioned the Superior Court for a habeas corpus and the issues he raised in that petition were decided by that court, he is not entitled at this time to file a petition for a habeas corpus on the same issues in this court."

In the Hawk case, *supra,* the petitioner had been denied a writ of *habeas corpus* by the Illinois Supreme Court but could still apply to the lower court and still have available a common-law writ of *coram nobis.* The Supreme Court said:

"Until that remedy has been sought without avail we cannot say that petitioner's state remedies have been exhausted."

In *U. S. v. Meyering,* 75 Fed. 2nd 716, it was held that:

"If a petitioner had begun a proceeding in a state court for habeas corpus, he could nevertheless discontinue that proceeding and file his petition for relief in a federal district court."

The decisions implied that the petitioner in the Meyering case could have complied with the requirements of exhausting his state court remedies by petitioning the U. S. Supreme Court for certiorari to the Supreme Court of Illinois, then abandoning the proceeding and filing a petition for writ of *habeas corpus* in the District Court. This is a pure technicality and is a distinction without difference since petitions for certiorari, as we have seen, are matters of grace, not of right.

It must be borne in mind that the petitioner in the instant case is not detained in Pennsylvania by virtue of a state court judgment, which is the holding in the Hawk case, but rather, is detained in Pennsylvania by virtue of a warrant of arrest issued by the Governor of Pennsylvania on extradition process. On this point, the court below held that:—

The doctrine of exhaustion of State remedies in *habeas corpus* cases does not apply to extradition. This court in *United States v. Superintendent of County Prisons* (1940), 111 F. 2d 409, 411, cert. den. 311 U. S. 662, stated: "The right of the State of California to

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demand the rendition of the relator from the State of Pennsylvania is found in Article IV, Section 2, clause 2 of the Constitution of the United States. This clause is not self-executing but is made effective by act of Congress (then Section 662 of Title 18, U. S. C., 1940 ed., now Section 3182 of Title 18, U. S. Code). The Supreme Court has construed this act as placing the burden upon the governor of the asylum state to determine, before complying with the demand, whether the person demanded is substantially charged (fol. 49) with a crime and whether he is a fugitive from justice. This determination may be made by the governor without a hearing, but if the alleged fugitive considers himself aggrieved by the order he may obtain hearing by a writ of *habeas corpus*. The writ may be allowed either by a state or federal court.", citing upon the last point referred to *Roberts v. Reilly*, 116 U. S. 80, *Drew v. Thaw*, 235 U. S. 432, *Biddinger v. Commissioner of Police*, 245 U. S. 128, and *Hogan v. O'Neill*, 255 U. S. 52. It was held by the Court of Appeals for the Seventh Circuit in *United States v. Meyering*, 75 F. 2d 716, 718, that if a petitioner had begun a proceeding in a State court for *habeas corpus* he could nonetheless discontinue that proceeding and file his petition for relief in a federal district court. See also *22 Am. Jur., Extradition*, Section 54, p. 293, where it is stated: "After the governor causes, by his warrant, the arrest and delivery of a person charged as a fugitive from justice from another state, the prisoner, since he is held under color of authority derived from the Constitution and laws of the United States, may invoke the judgment of the Federal, as well as the state, tribunals on the lawfulness of his arrest and imprisonment." See also *135 A. L. R.* at p. 985.

The Court below (Biggs, J.) concluded:

"In a per curiam opinion in the case of Powell v. Meyer (1945), 147 F. 2d 606, 607, this court overruled its decision in United States v. Superintendent of County Prisons sub silentio relying upon the decision of the Court of Appeals for the Fourth Circuit in Sanderlin v. Smyth, 138 F. 2d 729. The Sanderlin case, however, was not in point for in that case the application for habeas corpus was made to release the petitioner from a sentence imposed by a state court and the usual rule of exhaustion of state remedies necessarily applied. As we have said, the rule of exhaustion of state remedies does not apply where habeas corpus is sought to avoid extradition. We adhere to the rule which we announced in United States v. Superintendent of County Prisons and overrule our decision in (fol. 50) Powell v. Meyer. It follows that Johnson had the right to maintain the proceeding in the District Court in the instant case and we entertain no doubt but that he is entitled to his liberty."

Respectfully submitted.

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